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Walking a Successful Journey:

Myth, Realities, Challenges and Suggested Strategies

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"May the Law Be With You"

Contents

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1.0 INTRODUCTION

This Paper talks about ***"Walking a Successful Journey: Myth, Realities, Challenges and Suggested Strategies.***ò It explores whether the justice delivery journey has been a successful one, and if not, how it could be made so. It gives a brief introduction on the history of the common shared legal tradition in East Africa. Then a brief expose on the crisis of legitimacy and its foundations follows. Discussed next is what constitutes judicial transformation and change. This is followed with an analysis of judicial myths, realities, challenges and opportunities and strategies in justice delivery. Finally, a conclusion and some recommendations are made.

1.1 East Africa in Socio-Historical and Legal Context

Once upon a time, five of the East African Community member States namely, Kenya, Uganda, Urundi (Burundi), Uruanda (Rwanda) and Tanganyika, formed the ñ***Deutsch Osta Afrika.***ò They were all one territory under Germany colonial rule as a consequence of the ñinfamousò 1884 Berlin Conference, which saw the African continent being unilaterally apportioned among Western European powers into their ñ***Spheres of Influence***.ò The Western European powers went into two big ñworld warsò, the 1st from 1917-1919 and the second from 1944-1948, among themselves. It is in the aftermath of the so-called ñFirst World War ï (WWI), wherein Germany having been defeated, ñlostò its former territories of Kenya, Uganda and Tanganyika, which were styled as ñEnemy Propertyò to British rule. The remaining two countries of the five members in the ***Deutsch Osta Afrika*** Uruanda (Rwanda) and Urundi (Burundi) were placed under Belgian rule.

Consequently, the three East Africa countries which fell under British rule, Kenya, Uganda and Tanganyika, as it was the case for many other British colonies and ñOverseas possessionsò, were bequeathed with an alien legal system, the Common law adversarial

system.[1] Lord Denning, the Master of the Rolls in the *Nyali Bridge* case,[2] likened this to transplanting the ñ*English Oak*ò to the African soil expecting it ñ*to retain the tough character which it has in England."* Lord Denning figuratively expounded the concept of ñ***transplant***ò in the following words;

> ñ*Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It would flourish indeed, but it needs careful tending...in these far-off lands the people must have a law which they understand and which they will respect. The common law cannot fulfil this role except with considerable qualifications."*[3]

The transplanting of the common law adversarial system of adjudication was done through the ***"reception clause***ò incorporated in the various ñOrders-in-Councilò promulgated by the British parliament by extending the English common law and legal tradition to British overseas territories, apparently for ñ***peace, order and good government***.ò The ñreception clausesò which featured in most of the transplanting statutes in British territories were couched in more or less similar terms. Essentially they made the substance of the common law, the doctrines of equity and the statutes of general application as they were in force in and for England at a particular date called the ñreception dateò to apply in British colonised territories. The ñreception clausesò therefore marked the beginning of a very ñlong walkò in the journey of ñmodernò justice delivery systems in Africa and elsewhere the British set their feet. Even with the advent of political independence, the common law, doctrines of equity and statutes of general application have continued to be ñgood lawò in most of the former British colonies albeit with certain modifications ñ*as the circumstances and the conditions of*

[1] The "*Common Law, Doctrines of Equity and Statutes of General Application*", and the practice and procedure obtaining in English courts on the "reception date"

[2] *Nyali Ltd vs. Attorney General [1956] 1 QB 1(CA)*

[3] Ibid. At pp. 16-17. This case is discussed by Kibaya Imaana Laibuta in his PhD Thesis titled "*Access to Justice in Kenya: An Appraisal of the Policy and Legal Frameworks"*, University of Nairobi, Faculty of Law, November 2012 at p.3. Available at http://erepository.uonbi.ac.ke/bitstream/handle/11295/15704/Laibuta_Access%20to%20civil%20justice%20in%20Kenya%3A%20an%20appraisal%20of%20the%20policy%20and%20legal%20frameworks.pdf?sequence=4&isAllowed=y

*its inhabitants permit.*ò[4] However, it was easier to discern the substance of the common law, largely English ñjudge-madeò law, and the doctrines of equity, which as we know came to cure the mischief of the common law, but what comprised of ñstatutes of general applicationò was difficult to establish. Sir Kenneth Roberts-Wray commented in his book on *Commonwealth and Colonial Law* (1966), at p 545 commenting on the application of the common law had this to say:

> *"It has been in use for many decades, it has been the subject of judicial interpretation, it does not appear to have given the courts serious trouble, and it has much the same effect as the common law rule. So a change of formula may do more harm than good."*[5]

Similar language was considered by the Court of Appeal in the *Nyali Ltd v Attorney-General case (above)* where Denning LJ said that, the task of making qualifications to English law to suit the circumstances of overseas territories called for ñ*wisdom on the part of their judges*ò and described the provision as a ñ*wise provision*ò and that it was not incapable of application.[6]

During the colonial and in the post-colonial period, the ñtransplantedò[7] common law adversarial system of adjudication co-existed with the traditional legal systems. Rwanda and Burundi, which for their part fell under Belgian colonization, they were also bequeathed with an alien legal system, the Civil Law system. In the immediate past 1994 and in the advent of joining the EAC, Rwanda has adopted a ñ***hybrid legal system***,ò comprised of a mix of the best elements in both the Common and Civil Law systems. Burundi on its part has continued with the inherited Civil Law system but is also making some reforms to usher in the best of

[4] Ibid section 2(3) of the Judicature and Application of Laws Act, of the Revised Laws of Tanzania.

[5] Quoted in *Christian & Ors v. The Queen (The Pitcairn Islands) [2006] UKPC 47* (30 October 2006); [2007] 2 AC 400; [2007] 2 WLR 120, URL: http://www.bailii.org/uk/cases/UKPC/2006/47.html

[6] [1956] 1 QB 1 pp. 16 & 17

[7] Legal transplants have long attracted scholarly attention although Alan Watson "popularized" [See ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (1974)]; Alan Watson, Legal Transplants and Law Reform, 92 LAW. Q. REV. 79, 79 (1976). In 1938, Roscoe Pound declared that the "history of a system of law is largely a history of borrowings of legal materials from other legal systems and of assimilation of materials from outside of the law." ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 94 (1938);

the Common Law system. Within the East Africa region there is therefore a mixture of almost three types of legal systems which co-exist; the Common law adversarial system, a hybrid of the Common Law adversarial system and the Civil law inquisitorial system, and Traditional systems (some sort of a mix of ñcustomary lawò, Islamic law and Hindu Law, what Prof. Ali Mazrui fondly referred to as the ñtriple heritage.ò

With the kind of legal systems in vogue in the East African region, clearly a judicial officer ñ***walking the journey of justice delivery***ò faces a number of challenges whereby the struggle daily is with multifarious sources of law which are applied in resolving legal disputes. The extent to which the inherited legal systems of adjudication should be transformed, and what form this transformation process should take, and in which particular areas of the law should the transformation occur, and the best way to go about carrying out the transformation process therefore become crucial issues to contend with.

1.2 The Crisis of Legitimacy

On the brief historical background to the common legal heritage within the East African region outlined above, what immediately comes to mind is ***whether there is a crisis of legitimacy in our justice delivery institutions (courts)***. It is not uncommon nowadays to come across some disturbing news in our local newspapers and tabloids, and even in our respective Legislatures discussing problems in governance institutions, and those tasked with the delivery of justice, and about the *"unethical behaviour*ò of some of the judicial officers. Even the capacity of the various committees for Judicial Ethics and Conduct to regulate the behaviour of judicial officers has come under attack from some ñ*public spirited citizens*.ò In my opinion this could probably bereflection of a fundamental crisis not only in our justice delivery institutions, but in all our governance institutions. The basic functions of governance institutions have now been opened to debate and particularly with the revolution brought about by Information Technology, what previously used to be hidden from the public about how our justice deliver institutions and judicial officers perform, has now become a matter of public information.

In this Conferenceôs chosen theme, ñ***Transformation of Judiciaries in East Africa for Improved Service Delivery"*** the following questions therefore become pertinent in so far as

the transformation of justice delivery systems is concerned; ***should justice delivery institutions respond to change, or should they continue to perform their traditional function of deferring or buffering the consequences of transformation and change?***

It could not therefore have come as surprise that, the Organizers of this yearôs EAMJA Conference have, and appropriately and timely so in my view, chose the theme of ñ***Transformation of Judiciaries in East Africa for Improved Service Delivery.***"

1.3 The Foundations of Legitimacy

In the preceding section, I posed the question ***whether there is a crisis of legitimacy in our justice delivery institutions (courts).*** In this section I explore albeit very briefly, the foundations of legitimacy. In doing so I take comfort in the illuminating words of Wesley G. Skogan in his seminal expose, ñ***Judicial Myth and Reality***,ò where the learned author explained the foundations of legitimacy in the following words;

> *"We use the term "legitimacy" here in a special way: legitimacy is the willingness of people, for a variety of reasons, to defer to the decisions of judges-even if they lose. People may so defer (grant legitimacy) because they feel that* ***the law in their case was fair and impartial****, or, if they do not like the law, because* ***the judge appeared to exercise his discretion to look out for their interests****. They may defer because* ***the law in point is politically determined and amenable to change****, or because in its application* ***the judge applied generous measures of common sense****. In short, the citizen may grant legitimacy to the court for* ***substantive reasons*** *(he wins, he likes the outcome, he feels the law protects his interests), or for* ***procedural reasons*** *(decisions are made honestly, by good men, who arrive at their decisions in widely agreed-upon ways)."*[8] *(*Emphasis supplied).

According to Wesley G. Skogan the following are the foundations of legitimacy:

[8] Wesley G. Skogan, *Judicial Myth and Reality, 1971 Wash. U. L. Q. 309 (1971).* Available at: http://openscholarship.wustl.edu/law_lawreview/vol1971/iss2/6

1) ***The law is applied fairly and impartially (***the myth of objectivity***);***
2) ***The exercise of judicial discretion (***the myth of judicial discretion***);***
3) ***The law is politically determined and amenable to change; (***the myth of judicial supremacy; and
4) ***Judges (good and honest men and women) apply generous measures of common sense (***the myth of judicial independence and judicial activism**).**

1.4 The Two Facets of Justice

According to Wesley G. Skogan, there are two reasons citizen grant legitimacy to the courts, one is substantive justice, that: ñ*He/She wins, he likes the outcome, he feels the law protects his interests);* or secondly, procedural justice that: ñ*decisions are made honestly, by good men, who arrive at their decisions in widely agreed-upon ways."*

The substantive facet of justice has now become victim of the procedural facet, which has prompted the rise and use of familiar legal adage such as ñ***procedure is the handmaiden of justice",*** and ñ***legal technicalities should not be used to thwart substantive justice***ò, which many a lawyers are fond of referring to when seeking to dispose of matters at the preliminary stages of proceedings. It comes as no surprise that the time-tested legal adages find expression not only in judicial pronouncements but in constitutional provisions as well. Just as an example, Article 107A(2) of the 1977 Constitution of the United Republic of Tanzania (which borrowed from similar provisions in the 1995 Constitution of the Republic of Uganda and now it is also expressed in the 2010 Constitution of Kenya),[9] stipulates that:

> *"(2) In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say –*

[9] Article 159(2) of the 2010 Kenyan Constitution provides that: "*In exercising judicial authority, the courts and tribunals shall be guided by the following principles –(a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to... [criteria in clause (3)]; (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.*

(e) to dispense justice without being tied up with technicalities provisions which may obstruct dispensation of justice."

The Judiciary (courts) in the United Republic of Tanzania, and I am sure it is the case for the other East African countriesô judiciaries, is the ñ***only authority vested with final decision in the dispensation of justice."***[10] The judiciary/courts is/are constitutionally enjoined when exercising its/their judicial power to observe the principle of ñ***delivery of justice without being tied up with legal technicalities.***ò It is no secret that within our respective jurisdictions a good number of practising lawyers ñ*love*ò raising preliminary objections, some of which are frivolous.[11] Even some of our courts to a certain extent have become victim of the inherited disease of ñ*undue legal technicalities.*ò This if left unchecked may contribute to the obstruction of substantive justice. We as judiciaries we must avoid what the Retired Chief Justice of Tanzania Hon. Samatta,[12] once observed that, ñ***the wages of procedural sin should never be the death of rights."***[13]

It is quite relieving that there are some jurisdictions within the East African region including Tanzania, which have enacted laws specifically barring appeals on ñ***interlocutory matters***.ò[14] The most critical issue however, is the extent to which courts of law should dispense substantive justice and how they should deal with legal technicalities in order not to pay for the ñ***wages of procedural sin***ò thus avoid being ñ***death of rights***ò agents. The settled

[10] 107A.-(1*) "The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania."*

[11] The famous case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distribution Ltd [1969] E.A 696* stated authoritatively the test for a preliminary objection.

[12] *Philip Anania Masasi vs. Returning Officer Njombe North Constituency and Others Misc Civil Cause No 7 of 1995* (High Court - Songea) (unreported)

[13] In a recent election petition, *Mariam R. Kasembe vs. Cecil David Mwambe, The Returning Officer for Ndanda Constituency Parliamentary Election & the Attorney General, Misc. Civil Cause No. 3 of 2015, High Court at Mtwara*, Hon Dr. F. Twaib, J. picked a leaf from the jurisprudential wisdom of Samatta J.K. in *Philip Anania's case* by dismissing a preliminary objection that had been raised asking the Court to dismiss an election petition for failure to cite a provision of the law under which it was brought.

[14] Section 74(2) of the *Civil Procedure Code Act, Cap.33 R.E. 2002* (Tanzania) stipulates expressly that: "Notwithstanding the provisions of subsection (1) and subject to subsection (3), no appeal shall lie against or be made in respect of any preliminary or interlocutory decision or order of the District Court, Resident Magistrate's Court or any other tribunal, unless such decision or order has effect of finally determining the suit. A similar provision is contained in the Appellate Jurisdiction Act and the Court of Appeal Rules, 2009.

test for determining whether an objection falls within the rubric of undue technicalities is whether the objection goes to the root of the matter (jurisdiction), such as objection on limitation of time or no cause of action.[15] One example where the constitutional provision enjoining courts to deliver substantive justice without being tied up with undue technicalities came for judicial determination was in the case of ***Raila Odinga vs The Independent Electoral and Boundaries Commission and 3 Others.*** [16] In that case, Article 159(2)(d)of the 2010 Constitution of Kenya, which decrees that justice shall be administered without undue regard to procedural technicalities was judicially considered by the Supreme Court of Kenya, when justifying exclusion of belatedly-introduced evidence of alleged malpractice, in which it stated at para 218 as follows:

> *[…] The essence of that provision is that* ***a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties****. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course. The time-lines for the lodgement of evidence, in a case such as this, the scheme of which is well laid-out in the Constitution, were in our view, most material to the opportunity to accord the parties a fair hearing, and to dispose of the grievances in a judicial manner. Moreover, the Constitution, for purposes of interpretation, must be read as one whole: and in this regard, the terms of Article 159(2)(d) are not to be held to apply in a manner that ousts the provisions of Article 140, as regards the fourteen-day limit within which a petition challenging the election of a President is to be heard and determined."*

[15] See *Robert Leskar versus Shibesh Abebe, Court of Appeal of Tanzania at Arusha, Civil Application No. 4 of 2006 (Unreported); Citibank Tanzania Ltd versus Tanzania Telecommunications Co. Ltd, Court of Appeal of Tanzania, Civil Application No. 64 of 2003 (Unreported)*; and *Harish Ambaran Jina (by his Attorney Ajar Patel) versus Abdulrazak Jussa Suleiman [2004] TLR 343.*

[16] Supreme Court Petition Number 5 of 2013 as consolidated with Petitions 3 of 2013 and 4 of 2013.

In the ***Raila Odinga's case*** (above), the Supreme Court of Kenya having ñ*appreciated all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course"* nevertheless excluded the belatedly-introduced evidence. It seems to me that according to that case, sometimes certain prescriptions of procedure and form may be allowed by the court ñ*to trump the primary object*ò, of dispensing substantive justice to the parties. However, in that case it would appear that it was not a fit for exercising such discretion since ñ*there was a scheme of strict time-lines for the lodgement of evidence, which was well laid-out in the Constitution*.ò

1.5 The Myth of Judicial Discretion

It is common knowledge that judges do exercise some measure of discretion in making their decisions in criminal and civil cases. Judicial discretion is a norm in our courts of law but has to be exercised judiciously with reasons to be assigned thereto. A century ago, Justice Holmes offered a caution against courts making judgments about the merits of a given literary work. In determining whether or not that work should be given copyright protection, Justice Holmes observed that;

> *"...it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."*[17]

In *Regina v Latif*[18] Lord Steyn said that, a judge had power to stay a criminal prosecution on broad considerations of ñ***the integrity of the criminal justice system***ò when there has been an abuse of process which ñ***amounts to an affront to the public conscience.***ò In exercising this discretion, it was necessary for the judge to weigh in the balance ñthe public interest in

[17] *Bluestem v. Donaldson Lithographing Co., 188 U.S. 239 (1903)* (advertising posters held eligible for copyright protection) Id. at 251 quoted in Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments by Amy B. Cohen, *Indiana Law Journal [Vol. 66:175* at file:///C:/Users/user/Downloads/SSRN-id1971828.pdf

[18] [1996] 1 WLR 104, 112-113

ensuring that those who are charged with grave crimes should be triedò and the competing public interest in not conveying an impression that ñthe end justifies the means.ò

2.0 WALKING A SUCCESSFUL JOURNEY

2.1 Judicial Myth and Reality

In his seminal expose, the author Wesley G. Skogan reiterates the fact that, the notion of ***"judicial myth***" underpins a procedural foundation for legitimacy.[19] What exactly does ñjudicial mythò or what some authors refer to as official theoryò mean? In this section I discuss briefly the concept of judicial myth or official theory and then explore some of the most common judicial myths.

2.1.1 The Official Theory or Judicial Myth

The "official theory" or "judicial myth" serves the dual purpose of symbolically removing judicial decision-making from worldly processes and providing a higher source of law, law which members of the judiciary alone may discover. This model of the judicial decision-making process was representative of the theories of the age of constitutionalism, and the same mechanistic, rationalistic (almost Newtonian) political theory which spawned national constitutions and particularly the American Constitution, was embodied in the formal judicial theory of the day.

In its evolution, judicial myth consisted of a series of beliefs about law, judges and the judicial process which were interrelated and interdependent. These beliefs were the implicit base of the jurisprudence of the eighteenth and nineteenth centuries in England and the United States. The myth itself was rarely explicitly stated, and it was not until it began to come under attack that it was systematically presented, but it is possible to reconstruct it by integrating the explicit and implicit assumptions of the legal scholars of the times.

The legal theory implicit in the judicial myth was based upon a belief in an **objectively valid law**. Law, which was the "**perfection of reason**", was thought to arise out of the evolution of society and acquired, as it was refined by the wisest men in a succession of ages, an almost transcendental quality. Because of its accumulated wisdom and its objective validity the law could not "***but with great hazard and danger"*** be changed or

[19] Wesley G. Skogan, *Judicial Myth and Reality*

altered, and, according to Coke, it superseded even Acts of Parliament. Not only was the body of the law universal and valid, but, in addition, its unwritten nature enabled legal theorists to argue that it constituted a complete and closed body of rules.

The official theory of judicial behaviour is that judges stand outside the body politics. They decide cases at least the ñ***good, honest judges***ò do, by a body of rules and according to the inexorable and unvarying commands of logic. They are the spokesmen/women for the ñlaw.ò Politicians, like Members of Parliament and the Executive (President), should not therefore interfere, for if they do, the independent judiciary will lose its independence and we will cease to have a government of laws (*rule of law*) but of men (*rule of men*).[20] Such is the core of the official theory which has wide and powerful support and requires those who would influence the judiciary to do so within the context of this belief.

This conception of law as an objectively valid, systematic, closed and unchanging set of rules for human conduct is important, for it is central to the nineteenth century conception of the judicial process. Since law was perceived to be logically complete and consistent, the function of the judge was merely to ascertain the relevant facts of a case and, through strict deduction from general principles, apply the law to the case at hand.[21] Thus, judicial decision-making was reduced to the application of formal reason to the law. Combining the major premise of the law with a minor premise describing a case produced a decision. Since the common law was largely unwritten, however, the major premises were often of the judge's own creation. Judges were indeed ñ*the depositaries of the laws, the living oracles, who must decide all cases of doubt.*ò The ultimate responsibility of the individual judge for the creation of the law presented great difficulty for legal theorists expounding the judicial myth, for while logical processes could be utilized to find the law in abstract circumstances, most legal theorists realized that judges themselves were human beings.

The judicial myth, therefore, served to legitimate the activities of the judiciary by denying that they rested upon any but legal foundations. Judging was a mechanistic, rational-

[20] The Retired Chief Justice of Tanzania and re-known Jurist, Hon. Barnabas Samatta has written an illuminating book appropriately titled "*Rule of Law or Rule of Men.*" The rule of law protects us from the "*rule of men,*" therefore, it was necessary to deny that the bench is composed of "ordinary mortals."

[21] Haines, General Observation on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges, in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 42.43 (G. Schubert ed. 1964).

legal process above mere human passion, and, so long as the courts confined their substantive actions within the broadest limits of popular toleration, individual actions could remain unchallengeable.

The elements of the judicial myth were not only consistent with the mechanists' political theory of the Enlightenment, but they also tapped all of the basic sources of legitimacy described by Max Weber.[22] First, ***judicial decision-making was grounded in rational procedures and rituals-witness the emphasis on deduction, objectivity and the mechanistic application of a consistent body of law***. Secondly, ***judicial decisions were based on traditionally evolved standards of conduct and, in countries with written constitutions, were couched in the terms of a venerable constitutional document.*** Finally, ***the emphasis on the exemplary character, knowledge and forbearance of the judge, as well as upon the trappings and formal ritual surrounding the courts, appealed to charismatic sources of authority***. Other beliefs characteristic of our culture, however, also make demands upon the functioning of the judiciary, and these demands, seemingly inconsistent with the judicial myth, actually serve to provide new bases for judicial legitimacy.

Within the East Africa region and particularly in Kenya where a ñ***transformative constitution"*** was promulgated in 2010 after a long, protracted and ardours popular constitution making process, there are two political ideas which, rising and falling in their respective currency during the course of the constitution making process, have been important determinants of the fortunes of the ñ***New Kenya Judiciary***ò and particularly the new created Supreme Court of Kenya in its ñ*juridical struggle to maximize its influence upon the political system in the post-constitution making era*.ò

One idea is that, the doctrine of ñ***supreme, fundamental or basic law***ò,[23] supports the notions implicit in the judicial myth. The other idea is that, the notion of ñ***popular***

[22] M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 328 (T. Parsons & A. Henderson eds. 1947)

[23] In Kenya the 2010 Constitution, expressly declares the concept of the supremacy of the constitution under its section 2(1) as follows:

"This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

sovereigntyò[24] strengthens the hand of those wishing to limit the power of the court to thwart the actions of the representatives of the people. In essence it means that, the Judiciary should be accountable to the people. In response to this ñ***will-of-the-people***ò concept, it seems that the populist forces of the ***"transformation era***ò in Kenya prompted a widespread adoption of a new method of judicial selection and appointment alien to the traditional Common Law legal tradition of ñappointmentò by the Head of State (Executive): in Kenya witness is the popular application for appointment for judicial work, interview by a panel of stakeholders and an extremely rigorous vetting process for judges and magistrates. Although it may seem as if the participation of judges and magistrates in the process has shown to have compromised in part certain elements of the judiciary, in actual fact it has given the new Kenyan judiciary the additional quality of representativeness; members of the judiciary are ultimately responsible to the populace for their behaviour, at least they seem to. Not only does this serve to inhibit judges from stepping outside the boundaries established by popular conceptions of their basic role of dispensing justice without fear or favour, but it encourages them actively to pursue identification with these conceptions and to reinforce them in their public behaviour. The hope of any judicial official emerging from this process is to be perceived as embodying all of those characteristics essential to the performance of his/her intended office. Although such process does clearly cast judges and magistrates into the political arena, the practical effect of the style of vetting and confirmation by the Legislature of the appointment of judicial officers and of the representativeness gained by the formal recognition of their ultimate public responsibility has been to expand the basis of judicial legitimacy in the Kenyan system. It is worth noting that although judges are traditionally insulated from some of the conflicts which constitute democratic politics, in the process of making policy decisionsð choosing between alternatives with effective political consequences - members of the judiciary enter the political arena.

[24] Art. 8(1)(a) of 1977 URT Constitution stipulates: *"The United Republic of Tanzania is a state which adheres to the principles of democracy and social justice and accordingly – (a) sovereignty resides in the people and it is from the people that the Government through this Constitution shall derive all its power and authority."*

2.1.2 The Myth of Objectivity

In their thinking judges employ analysis of facts and apply the law and give reason for the decision. This is what constitutes impartiality. Analysis is the breaking down of a system into its component parts and the evaluation of how well those parts function, both separately and together. An efficacious analysis of anythingð whether itôs a contract, a relationship, a corporation, or a short storyð employs and necessitates the critical thinking skills of defining terms (or component parts), gathering and evaluating the evidence, and moving step by step from the suppositions you draw from that evidence, to a tentative thesis and, eventually, to a final thesis and conclusion. The best analysts are the most skilled critical thinkers, and vice versa. It all begins with objectivity. This however is easier said than done. That means you are detached, dispassionate, and unbiased in your perceptions and ideas. Can you or anyone be completely objective? The answer is simply no. We are all invariably and inevitably shaped and affected by our paradigms: our point-of view, our heredity, environment, socio-economic perspective, our training, life experiences, strengths, weaknesses, and vested interest. The best we can do is to attempt to put our biases aside and look dispassionately at the issue, system, or text that we are analyzing. Thatôs called ñ***Formal Criticism***òð when we attempt an evaluation of written or spoken words without any of our own feelings or the worldôs information to alter what we heard or read and understand. However, Formal Criticism, although it is perhaps a noble undertaking, is, nonetheless a utopian ideal rarely achieved. Subjective bias is inevitable.[25]

In our respective jurisdictions, judges are drawn from a variety of sources but largely from the Bar and some from University professors and lecturers. If this be the case then the first proposition is obvious but should be stated nevertheless: ***lawyers, simply because they are trained to be advocates-to take sides-face a particularly difficult task when called upon to shed the habits of their training (and practice) when operating either on the bench or in writing for learned journals***. Settling human disputes through employment of an adversary

[25] See Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); and Principally Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. Cm. I. L. Rev. 661 (1960) - the adversary system tends to create simplistic "solutions" to what really are immensely complex problems.

system may, and doubtless does, have considerable merit, although certain basic flaws in that method of making public policy now seem to be more and more obvious.

What this proposition means, in essence, is that the very reasoning process of lawyers, including judges and law professors, is from conclusion to premise rather than a logical deduction from major premises to conclusions. At the very best, legal reasoning depends on choices to be made from basic value premises, choices that quite often (perhaps usually) can only be personal and essentially arbitrary. It has been said that;

> "*...to accept this position for the judicial process would make a mockery of the demand for reasoned, adversary participation in adjudication, and the necessity for a legal system that its rules will be applied in a reckonable way to settle any disputes (to say nothing of the requirements of democratic theory*)."[26]

Article 107A(2)(a) of the 1977 Constitution of the United Republic of Tanzania enshrines the constitutional principle that, in delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say ï ñ(a) *impartiality to all without due regard to ones social or economic status*.ò This principle constitutes the ñGolden Ruleò for judges: Objectivity is a myth but fairness is a must. The belief in objective values what is also called ñ***the myth of objectivity***ò, which holds that some things are objectively right or wrong, independently of what anyone may think or feel (right).

Just as an example, in a society engulfed with discrimination on the basis of the colour of the skin of a person, racism is objectively wrong. Discriminating against a people on the basis of his/her skin colour would therefore be wrong even if no society recognized this. In such society, in their fight for equality, human rights activists would therefore appeal to a higher truth about right and wrong, one that wasn't dependent on human thinking or feeling and therefore any culture that approved of racism would be mistaken. Some legal pundits may disagree with this arguing for cultural relativism that, the norms of another

[26] Grant, Felix Frankfurter: A Dissenting Opinion, 12 U.C.L.A. L. REv. 1013 (1965); Weiler, Two Models of Judicial Decision-Making, 46 CANADIAN BAR REV. 406,432 (1968). Ibid.

culture may be different from that of other people, and that morality is a cultural construct, and further that there are no objective truths about what is right or wrong.

2.1.3 The Myth of Judicial Independence

Independence of the judiciary operates as a formidable check on the actions of the other two branches of government, the Legislature and the Executive. The reality is that, the Legislature and the Executive (President) have checks on this check (the Judicature), too. The Legislature largely controls the courtsô jurisdiction ð their authority to hear and decide cases- by enacting laws determining courtôs jurisdiction and sometimes even limiting judicial discretion particularly in sentencing by stipulating for ñminimum sentencesò and bail conditions in ñserious offences.ò And if the courtsô decisions conflict with the Constitution itself, the Legislature and the President possess the power to disregard them. In Ghana it is a criminal offence for one to disobey courtôs order issued in constitutional cases. After all, the Legislature and the President are bound by oath to support and defend the Constitution, and must resist unconstitutional actions by the courts, and by each other, just as the courts are bound to resist violations of the Constitution by the Legislature and the President.

The courts have power to decide cases ð and thus check the Legislature and the President ð but little practical power to enforce their decisions, and none to command the other two branches. The courts have the power merely of judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments. Indeed, if the courts could command the other two branches that would violate the Montesquieu rule that the accumulation of all power in one set of hands is ñ*the very definition of tyranny*.ò

The Three ñPowersò, that is, the Executive, the Legislature and the Judicature, describe the respective powers of these three branches of government, including the nature of ñthe judicial Powerò of the courts. With respect to the courts, the independence of the judiciary, combined with the status of the Constitution as supreme law (at least the 2010 Kenyan Constitution states so expressly), entirely justifies the idea of constitutional judicial review of legislative and executive acts. However, the power of judicial review cannot be taken to imply ***supremacy of the judiciary*** over the other branches in constitutional

interpretation, but only independence of those branches in the performance of its judicial duties.[27]

The power of independent judgment as to the meaning and application of the law is especially significant under our constitutional regime precisely because the Constitution itself is designated as the supreme law of the land (at least the 1995 Constitution of Uganda and the 2010 Constitution of Kenya provide so expressly). Courts interpret and apply the law as part of their regular function of deciding cases, and the Constitution is part of ñthe lawò ð indeed, the supreme law ð that courts are to apply. Thus, the courts ð with the Appellate Court (Tanzania, South Sudan) or Supreme Court (Burundi, Kenya, Uganda and Rwanda) at the top of the judicial hierarchy ð possess an independent power to interpret and apply the Constitution, as a consequence of their customary power to interpret and apply the law in cases before them but this does not make the Appeal Court (Tanzania, South Sudan) or Supreme Court (Burundi, Kenya, Uganda and Rwanda) supreme over the other branches particularly considering the Constitutionôs separation of powers. However the judicial power of constitutional interpretation is a meaningful check on the other branches.[28]

Within the East African region, national constitutions embody the judicial power to declare an Act of Parliament or executive action void if inconsistent with constitutional provisions or human rights in the Bill of Rights. The presumption however is in favour of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. In performing this noble judicial duty, the judiciary should not lose sight of the fact that one branch of the government cannot encroach on the domain of another without danger, and that the safety of our governance institutions depends in no small degree on a strict observance of this salutary rule.

For example Article 4.-(1) of the 1977 URT Constitution which embodies the doctrine of separation of powers, though not explicitly stated, stipulates as follows;

[27] Francis M. Burdick, Some Judicial Myths, Harvard Law Review, Vol. 22, No. 6 (Apr., 1909), pp. 393-402, Published by: The Harvard Law Review Association, DOI: 10.2307/1324513, Stable URL: http://www.jstor.org/stable/1324513

[28] American Doctrine of Constitutional Law by James B. Thayer, 7 Harvard Law Review 129, 142; Haines, American Doctrine of Judicial Supremacy, p. 288.

*"All state authority in the United Republic shall be exercised and controlled by two organs vested with executive powers, two organs vested with **judicial powers** and two organs vested with legislative and supervisory powers over the conduct of public affairs."*

Article 107A.-(1) of the 1977 URT Constitution pronounces categorically that;

> **"***The Judiciary shall be the authority with final decision in dispensation of justice in the United Republic of Tanzania."*

And Article 107B of the 1977 URT Constitution pronounces itself on the doctrine of the independence of the judiciary by stating that;

> *"In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land."*

The above cited constitutional provisions, which are also found in almost all the national constitutions within the East African region, albeit with varying tones, comprise of the judicial myth of independence of the judiciary, which is a product of many social forces. Historically, an argument for judicial independence was a powerful weapon in the hands of Parliament in its struggle for independence from the King in England, where most of our independence constitutions traced their origins ï the Westminster model. In England then, to the members of the Inns, led by Coke, the judicial myth was a useful tool which increased their political influence and independence.

2.1.4 The Myth Judicial Supremacy

There is a recurrent myth of ñ***judicial supremacy***ò in constitutional interpretation ð a view which traces its history to the famous American decision of ***Marbury vs. Madison***. The common held myth is that, the power of constitutional interpretation is exclusively vested in the courts, but not with the other branches and officers of government. Time and again however we have noted in our jurisdictions the other two branches, the Executive and the Legislature contesting to be bound to accept, unthinkingly and reflexively, whatever the courts decide. The most radical view is to state that, the power of constitutional interpretation is a divided, shared power incident to the functions of each of the branches of the government

ð and to instruments of local governments, and of quasi-judicial bodies and tribunals, as well ð with none of these actors literally bound by the views of any of the others.

2.1.5 The Myth of Rule of Law and Judicial Activism

The problem of obedience is particularly interesting in the case of the judiciary. Judges, acting in certain ways and following particular procedures, allocate society's resources-they perform a political function. They do not merely transmit allocations of resources (laws) made elsewhere in the system. In determining the manner in which laws will be applied in specific situations, and in interpreting the meaning of often vague legislative mandates, judges play a creative political role. Laws are, in the end, ***what judges say they are***. In reality, law is then merely a set of expectations about judicial behaviour. Although they are traditionally insulated from some of the conflicts which constitute democratic politics, in the process of making policy decisionsð choosing between alternatives with effective political consequences -members of the judiciary enter the political arena. The question is this: to what extent does the judicial myth reflect the way in which judges actually make decisions? After all judges are human beings and in their desire for community approval, ñ*it is not surprising that some of them drift with the sentiments of the times and fill the interstices of the law somewhat as if they were the direct agents of democracy.*ò[29] However, the judge cannot in his personal conduct or official demeanour violate the mores of the community. The public demands that the judge have no taint to his personal life. They must be held in high regard, for they are the last check between the individual and the government. They control the lives of others and pass judgment on personal misconduct every day.

The classic rubric, ñ***the rule of law protects us from the rule of men***,ò is an articulation of the first element of the nature of law. The notion that the law both controls the operation of the legal system and the caprice of individual decision-makers is clearly

[29] Carl Swisher, The Supreme Court in Modern Role *5* (1958). [Vol. 1971:309 http://openscholarship.wustl.edu/law_lawreview/vol1971/iss2/6

reflective of the judicial myth even in an age when ñ***popular sovereignty***ò overshadows the theory of a more fundamental law.

Political scientists almost universally describe courts as political institutions. Politics involves the authoritative allocation of social benefits; courts authoritatively allocate social benefits; ergo, courts are political institutions. To the judges, however, judicial decision-making is rooted in a series of processes which effectively remove it from normal interest-group, bargaining, power politics. The judges, especially those trained in the common law tradition, bow to the importance of doctrines of legal precedent, objectivity, the protection of legal rights and the rule of law. Judges realize that they do make the law and that their judicial activity cannot be abstracted from the cultural milieu of which they are a part, but their conception of the judicial role and of their political responsibility serves to sever the ñnormalò connections between politics and policy in the judicial process. It will be surprising to know that for the majority of the public, ignorant as they are of the law and their legal rights, still it is not concerned with the content of the court decisions. Rather, the importance of personal characteristics of judges and magistrates: honesty, humility, objectivity, and human sympathy. In jurisdictions where judges apply for the job and be interviewed those who may win public approval are those who have personified the attributes described as characteristic of the judicial myth. If judges believe that their personal interest in retaining office is dependent upon their judicious conduct, then not only will their behaviour tend to reinforce the judicial myth among the population, but in addition the independence of their decision-making from normal political pressures will be enhanced. Thus, the legal training, experience and self-interest of the local judiciary enable them to conceive of their jobs, and perhaps to execute them, in what they believe to be ñnon-politicalò terms.

The hallmark of the judiciary is therefore to dispense equal justice for all, with speed and timely. This noble principle finds constitutional expression under Article 107A(2) of the 1977 URT Constitution which stipulates that;

> ñ*In delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say –*
> *(b) not to delay dispensation of justice without reasonable ground;"*

Furthermore, Article 170A(2) of the 1977 URT Constitution embodies alternative dispute resolution mechanism by stating that in delivering decisions in matters of civil and criminal nature in accordance with the laws, the court shall observe the following principles, that is to say ï

> *(d) to promote and enhance dispute resolution among persons involved in the disputes;"*

One approach to an analysis of the sources of judicial legitimacy can be based upon the apparent functions that the judiciary performs in social life. Courts are essentially institutions that routinize conflict resolution by channelling disagreements over the allocation of social resources into orderly and procedurally regularized arenas. Notably, in performing its noble constitutional task of resolving disputes, the ñjudiciaryò as a system is therefore a ñ*Service*ò oriented institution composed of ñ***judicial officers***ò (*those who perform the functions and exercise the powers of adjudication or determination of cases in the courts of law*); and **"non-judicial officers" (***all persons who perform the functions and exercise the powers, other than judicial officers*).[30] The day-to-day administrative functions of the judiciary are in the hands of ñCourt Administrators.ò In the context of walking a successful journey in justice delivery, the main consideration should therefore be on the actions and practices of both judicial and non ï judicial officers as well as other stakeholders who make the ñclogs in the wheelsò of administration of justice roll.

2.2 Challenges in the Delivery of Justice

2.2.1 Introduction

In 2012, I had the opportunity of presenting a Paper titled ñ***Breaking the Mould; Addressing the Practical and Legal Challenges of Justice Delivery in Tanzania***ò at the Annual Conference and General Meeting (AGM) of the Tanganyika Law Society (the

[30] See section 3 of the *Judiciary Administration Act*, No. 4 of 2011 (Tanzania)

National Bar Association).[31] In that Paper I discussed at length some of the challenges facing the justice delivery system in Tanzania Mainland. In 2015, I returned to the same venue for yet another AGM of the TLS where I also presented a Paper titled ñ***Unearthing Key Challenges and Solutions in Advancing Justice in Tanzania.***ò In this Conference I have been asked to talk about judicial myths, realities, challenges and strategies in making a successful journey in justice delivery. I am not therefore expected to jot down the details of the challenges in the delivery of justice, for these are well documented. Everybody gathered here today is aware of the familiar adage that, ñ***Justice delayed is justice denied"*** and itôs most recent cousin, ***"justice hurried is justice buried.***ò In my view, these adage summarizes the main challenge in justice delivery mot only within the East Africa region but in many other places where the modern system of justice delivery is in the offing.

2.2.2 Popular Dissatisfaction with Delivery of Justice

In 1906, Dean Roscoe Pound of the Harvard Law School gave a seminal speech at the Annual General Meeting of the American Bar Association (ABA) on ñ*The Causes of Popular Dissatisfaction with the Administration of Justice (1906)."* In his address Dean Roscoe Pound noted that: ñ*Dissatisfaction with the administration of justice in general and the legal profession in particular, is not new. It is as old as the law itself."*[32]

The observations Dean Roscoe Pound made almost a century ago concerning factors which led to popular dissatisfaction with the delivery of justice are as valid today as they were then. In 1994, Edward D. Re perhaps out of inspiration by Dean Roscoe Poundôs famous address in 1906 wrote a Paper on ñ*The Causes of Popular Dissatisfaction with the Legal Profession"*[33] echoing what Dean Roscoe Pounds had said more than a century ago, but this time around concerning the legal profession. In his 1906 address, Dean Roscoe Pound dealt with among other topics: ***procedure, adversarial systems, uncertainty, delay,***

[31] held from the 17th – 18th February, 2012 at the Arusha International Conference Centre (AICC)

[32] Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, 29 A.B.A. REP. 395, 395 (1906).

[33] Re, Edward D. (1994) "The Causes of Popular Dissatisfaction with the Legal Profession," St. John's Law Review: Vol. 68: Iss. 1, Article 3. Available at: http://scholarship.law.stjohns.edu/lawreview/vol68/iss1/3

expense, multiplicity of courts, concurrent jurisdiction, geographic jurisdiction, jury systems, political influence on and in courts, and public ignorance regarding the courts. Forty three years later, Chief Justice Arthur T. Vanderbilt of New Jersey, in his speech on ñ***Minimum Standards of Judicial Administration" (1949),*** addressed a rather different list of topics: ***the selection, conduct, and tenure of judges; managing the business of the courts; rulemaking and the judicial regulation of procedure; the selection and service of juries; pre-trial conferences; trial practice; courts of limited jurisdiction; the law of evidence; appellate practice; and state administrative agencies and tribunals.*** It is worth noting that the latest generation of standards for administering justice have moved from the Dean Roscoeôs **quantitative** aspects of courts to the **qualitative** by espousing and attempting to measure ***access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence***.

The areas both Dean Roscoe Pound (1906) and Chief Justice Arthur T. Vanderbilt of New Jersey (1949) covered, constitute what in my opinion constitute a total sum of the challenges in the justice delivery across judicial systems within Common Law jurisdictions. In the following section I will attempt to discuss only some of the main challenges our Judiciaries are confronted with.

2.2.3 Transformation in Justice Delivery

2.2.3.1 The Adversarial System of Adjudication

As I pointed out at the outset, **t**he institutions for delivery of justice in four of the six East African Community (EAC) Member States are ñ*moulded" from the same "mould*ò- the common law adversarial system of litigation; and for Rwanda and Burundi, the Civil Law inquisitorial system respectively. Unfortunately, these two systems of adjudication make litigation a thing of first resort. Alternative systems of dispute resolution, which are the bedrock of our traditional dispute resolution systems, have almost been neglected and/or relegated to the background. The inherited common law adversarial and civil law inquisitorial systems in vogue within the East African region, with its attendant English practice and procedure (common law) always has been at the centre of public criticism for contributing to

delays in the dispensation of justice together with its attendant legal technicalities and high costs of litigation.

2.2.3.2 Judges lack control of the judicial process

Furthermore, the adjudication system for a large part is in the hands of the parties and their lawyers/attorneys/advocates. Judges or magistrates who stand as ñumpires/refereesò to watch the legal battle being fought in the ñTemple of Justice, do not have much control over the process. Consequently civil litigation has been dogged with frequent adjournments, which contribute to further delays in the delivery of justice.

2.2.3.3 Rules of Procedure and Evidence

Civil litigation follows the inherited English procedure of orderly conduct of court trials with direct examination or examination-in-chief where the plaintiff/petitioner calls its witnesses and introduces evidence at trial. Essentially, direct examination elicits factual information from either witnesses or writings for the purpose of supporting the allegations in the petition. A chronological arrangement offers the best approach for reasons of clarity and "story telling." Unfortunately, this has also been another source of delays in delivery of justice. At least the new rules of procedure of the Commercial Court of Tanzania which have been operational since 2012 are a living testimony of the expedited process in civil litigation. The Rules have done away with the procedure of examination in chief by introducing ñwitness statementsò in civil matters initiated by a plaint and ñaffidavit evidenceò in civil matters initiated by ñoriginating summons.ò By cutting down on the time spent on examination in chief, a practice common in arbitration proceedings, this has expedited commercial justice delivery.

There has been some criticism levelled at the doing away with examination in chief, which may seem as interfering with the time worn ñbest evidence ruleò of oral evidence. However, the New Commercial Court Rules have retained the right of cross examination in the proceedings. It is an undisputed fact that the bulk of examination in chief which is embodied in the inherited Civil Procedure Codes has been a factor in unnecessary delays in civil litigation and for the most part, lawyers spent a lot of time asking questions some of

which are not that relevant to the dispute at hand. The recipe for successful cross examinations mandates plenty of preparation, including thorough research into possible bias and conflicting statements, and most importantly, the use of short and clear, leading questions.

2.2.3.4 Archaic and Obsolete Laws

The administration of justice is still hampered by a number of archaic and obsolete laws and rules, whose review falls under the various parent ministries responsible for legal matters. The line ministries have not been that prompt in taking appropriate action to bring up recommendations for review or amendment or repeal of such laws. This has been hampered by lack of political will on the part of our Governments and some conflicting interests of some sections in our society to implement legislative proposals by our Law Reform Commissions.

In the case of Tanzania and I am pretty sure the position is the same in the other jurisdictions, Chief Justices have delegated legislative powers to make practice directions and procedural rules with regard to practice and procedure in our courts. In the case of Tanzania, the Chief Justiceôs Rules Committee has mandate to propose Rules of Procedure and Practice with regard to a number of areas.

2.2.3.5 Use of Foreign Language in Court and in the Law

Our justice delivery system still suffers from the use of foreign language in the superior courts, the Supreme Court, the Court of Appeal and the High Court, where English is by law, the official language of record. In the case of Tanzania it is particularly bewildering in a country where its official language is Kiswahili and which is spoken and understood by the majority of the population, most of the laws are available in the English language. It is an irony that even in our Parliament where the language of business is Kiswahili most of the laws passed there are in the English language. The majority of the litigants in our courts are not conversant in the English language. As such the use of English in court business may amount to denial of access to justice.

In 1731, the UK Parliament enacted a statute providing that all court documents ñ***shall be in the English tongue only, and not Latin or French***ò [*English Act, 1731, 4 Geo.*

II Ch. 26.][34], which did away with Norman French. Rather unfortunately, many legal minds take comfort in ñ***talking in tongues***ò by smearing their submissions with grain of Latin, and this long after the dust of the Norman Conquest has settled!

2.2.3.6 Lack of or Inadequate Legal Representation

Another challenge facing civil litigation system is lack of adequate legal representation particularly for poor litigants in courts of law. Understandably within the East Africa region, legal representation particularly for the indigent litigants (pro se litigants) is not a widely applicable phenomenon due to the small number of registered practicing lawyers, the majority of whom are urban-based, and their fees are exorbitantly high. Legal aid where available, is only in certain specified criminal matters such as murder and treason, and in certain civil disputes, where some Legal Aid NGOs applying the ñmeans test.ò The Government of Tanzania has already established a Public Legal Aid Department within the Ministry of Justice and Constitutional Affairs mandated to provide policy direction and coordination of the provision of Legal Aid. Much as there is yet no fully funded National Legal Aid Scheme or Fund, the donor-funded Legal Aid Facility Scheme is already operational in about sixteen districts in Tanzania Mainland and Tanzania Zanzibar where paralegals assist indigent litigants in processing their claims in subordinate courts, the majority of which are located in remote rural areas.

In Tanzania, perhaps with the exception of Primary Courts, where advocates are statutorily barred from appearing, litigation is largely lawyer dependent especially in civil matters where parties hire private advocates. In criminal matters, the state provides legal representation, but only in heinous crimes, murder and treason. The traditional common law view of the adjudication process is that, judges should only play a passive but not an active role in civil dispute processing, which means that, the lawyers not the judges are in control of the process. A common law Judge hold the strong view that active engagement in the

[34] Pollock & Maitland, *The History of English Law Before the Time of Edward I* 79, 2nd ed. 1899 and Harry W. Jones, Our Uncommon Law, 42 *Tenn. L. Rev.* 443, 450 (1975)

progress of a case may compromise the disinterested independence, neutrality or impartiality of the judge.

2.2.3.7 Lack of Procedural and Physical Access to Justice

Constitutionally, dispensation of justice is governed by the principle of ñ*fair, public hearing by an impartial and independent court or tribunal*.ò This suggests among other things that, there has to be a courthouse in the sense of a physical structure specifically designed to be a justice delivery centre and where the public will have unhindered access to so that it can facilitate the enjoyment of their constitutional right of ñ*fair and public hearing.*ò Unfortunately, the majority of our court houses are fairly old and dilapidated. This makes the working environment for judicial officers very unfriendly thus impacting negatively on delivery of justice. It will not be far fetching to haphazard a summation that, the majority of our judicial officers and nonï judicial officers operate in extremely poor working environment where they are always forced to ôbargainô for adequate work space, facilities and general supplies which the justice delivery system generally suffers from. It will not be gainsay that, the independence of the judiciary will be first victim where there is lack of adequate administrative arrangements for judicial officers.

Our justice delivery system is still largely urban based. This makes access to justice for the majority of our people, 80% of whom live in rural areas, considerably problematic. In some areas, there are no court houses thus forcing litigants to travel long distances in search of justice. This problem is further compounded with lack of adequate funds for judicial development activities particularly in the construction of new court houses and maintenance of existing ones as well as residences for judicial officers.

2.2.3.8 Challenges in the Criminal Justice System

One of the biggest challenge facing the criminal justice system is delays in investigation in murder cases and the time wasted in conducting Preliminary Inquiry (PI) by subordinate courts before committing the accused person to the High Court for Preliminary Hearing (PH) and finally trial. There is no added value in my view in the PI procedure. Besides, there are number of cases where the magistrates conducting PI sometimes forget or

overlook to make a a committal order to commit the accused to the High Court for PH. In a recent decision of the Court of Appeal of Tanzania,[35] where a proper committal order was missing, and the High Court proceeded with the conduct of PH, the whole proceeding was declared a nullity with an order that the whole of process should start afresh with the holding of a fresh PI and PH before the case could be set for trial. This clearly may cause untold suffering to an accused may languish in remand custody waiting for justice to take its course and this for no mistake of the accused person but of the court.

The other problem facing the criminal justice system is the nature of the client-attorney relationship. In principle a Legal Counsel appointed or tasked with undertaking to represent an indigent defendant in court, whether it is a public defender or a volunteer private advocate, the parties enter into an attorney-client relationship, which is no less inviolable than if counsel had been retained. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused. It is a matter of law for an accused person facing a murder or treason charge to be provided with an attorney at state expense. The need for the law to be amended to include other serious crimes cannot be overemphasized.

2.2.3.9 Challenges in the Juvenile Justice System

In Tanzania, save for only one court house in Dar es Salaam, there is no separate juvenile justice system in the sense of separate court houses. The new Law of the Child Act, of 2009, however envisages a separate juvenile justice system in the sense of separate court houses, specialized judicial officers and rules of practice and procedure for handling cases of children in conflict with the law and those in need of special protection and care. With only one juvenile court as a separate courthouse dedicated to handling cases involving children in conflict with the law and without judicial specially trained in such matters, clearly there is still a long walk to success in administration of juvenile justice in Tanzania. The implication is that, throughout the country children in conflict with the law are arraigned before normal courts meant for adults. The possibility of violating the rights of children in conflict with the

[35] *Republic vs. Tumwime Criminal Revision No.01/2006* (CA)(MZA) (unreported).

law as stipulated under Article 40 of the United Nations Convention on the Rights of the Child, 1989, which Tanzania has ratified is not that far to fetch.

Another challenge confronting the juvenile justice system is that, children who are victims of crime testify in open courtroom thus having to endure the pain of facing yet again the perpetrators of the crime with the potential risk of not being able to give evidence freely. In Zanzibar at least where there is a dedicated courthouse for children, evidence is given through closed circuit television (CCTV) thus shielding the child victim from its perpetrator. This makes the child victim of the crime and child witnesses free and comfortable in testifying against the perpetrators. It is therefore critical to shield children who are victims of crime from any anticipated harm by having to testify in court.

The other challenge facing the juvenile justice system is that, not so many judicial officers and lawyers who handle cases involving children are trained in the specific laws, the rights of children, and child psychology. Consequently, judicial officers who handle cases involving children tend to treat those children just like adults especially when examining them in the courthouse to elicit information relating to the case in which the child is either a victim or a witness. The manner in which judicial officers handle ***voir dire*** hearings in cases involving children also leaves a lot to be desired. The need to have a child to testify via close-circuit television or videotape, if certain conditions are met is of utmost urgency as well as training for judicial officers and lawyers who handle cases involving children.

2.2.3.10 Challenges in the Sentencing and Punishment System

In Tanzania there are no sentencing guidelines in place. In Uganda and Kenya there are Sentencing Guidelines in place. For those jurisdictions where such Guidelines do not exist the challenge has been the existence of unexplained variations in sentencing by judicial officers in cases of similar nature. This has, in some occasion, led to public complaints that the sentences meted out by judicial officers do not match the severity of the crime. In Tanzania, the Chief Justice has already tasked the Rules Committee to prepare some Sentencing Guidelines which will guide judicial officers in their approach to sentencing so as to avoid arbitrariness in sentencing.

2.2.3.11 Challenges in Judicial Behaviour and Work Attitude

Our system of recruiting and appointment of judges is such that once they take the Bench, the public expects judges to be good judges. The question then becomes: who is to judge the Judge? What does the public expect from its Judges? This problem is compounded by lack of dedicated institution in most of our jurisdictions legally mandated to provide meaningful and accurate information to the public on the performance of judges and justices. For the most part our ñJudicial Service Commissionsò merely recommends the names of persons to the President for appointment as Judges, but do not have a designed method of providing to the public clear and accurate information about the performance of each Judge and Justice on the Bench. The existence of an open performance appraisal system (OPAS) for judicial, controversial as it is, may contribute greatly to making Judges and Justices really providers of judicial services, and to make them accountable to the people they are meant to serve.

2.2.3.12 Judicial Performance Standards

In tandem with lack of an open performance appraisal system for judicial officers, there are no set judicial performance standards in place in most of our jurisdictions. At least in Tanzania for now there are performance benchmarks (quantitative) every judge and magistrate. However, there is no legally provided judicial performance standards in place. In other countries such as the United States of America, and particularly the State of Arizona, so far the only state in the USA with a constitutionally authorized judicial performance evaluation has a system of votersô approval since 1992, for the establishment of a process to review judges' performance. In the states in the USA where there exist judicial performance evaluation systems, different from many common law jurisdictions, judicial performance review serves two purposes. One is to provide the public with information about judges who are standing for retention; and the second is to encourage judicial self-evaluation and improvement. Therefore Judges are evaluated pre-election and mid-term, since in the USA

judges are elected to the Bench and retain their position if they garner a sufficient number of votes from voters.

In Arizona where there is a system of judicial performance evaluation, there is a Commission on Judicial Performance Review (JPR) consisting of no more than thirty-four (34) members, who are appointed by the Supreme Court, and include lawyers, judges, and members of the public. The principle is that o more than six members may be lawyers, and no more than six members may be judges. The Commission surveys those who have come into contact with judges, including litigants, witnesses, jurors, court staff, attorneys, and other judges.

A public input survey is also available. Judges are evaluated on such criteria as ***legal ability, integrity, judicial temperament, communication skills, and administrative performance***. Based on survey information, Commission members vote on whether a judge "meets" or "does not meet" judicial performance standards. Judges also complete self-evaluation surveys and meet with conference teams composed of a judge, an attorney, and a member of the public to discuss their performance review. The results of pre-election performance reviews are mailed to voters and made available at public centres such as libraries, banks, and grocery stores. The evaluations and reviews are normally taken into consideration by the Arizona Commission on Judicial Performance Review (JPR) in evaluating the performance of Judges. In principle, the judicial evaluation process is intended to evaluate a judge's performance in relation to the applicable judicial performance standards. The person performing the evaluation must attempt to obtain balanced information from multiple sources to accurately assess the judge's performance during the evaluation period.

I should not be seen as trying to advocating emulating the Arizona approach in reviewing the performance of every individual Judge, but at least some modified semblance of it would do, particularly where benchmarks on judicial performance for judges and magistrates (qualitative evaluation) is in place. Our Judiciaries in the East African region should now try to adopt performance benchmarks (qualitative criteria) as well as judicial performance evaluation standards and regulations for conducting judicial performance evaluation (qualitative criteria). For example in Ghana where I happened to visit in 2015, there is a clearly set out judicial performance standards and evaluation process, as a result of which any individual judge who does not meet the expected performance standards is

recommended to the Judicial Service Commission for remedial measures including attending some legal courses.

2.3 Suggested Strategies

Our judiciaries should:

- Adopt a clear Transformation Framework and Policy Guidelines
- Put in place Strategic and Work Plans
- Champion Legal and Institutional Reforms
- Strengthen their Management Systems
- Strive to garner for Work Culture and Customer Care approach in service delivery
- Create and adopt Judicial Performance Appraisal Systems
- Put in place a Monitoring and Evaluation Systems
- Embark on developing and using Case Management Systems
- Create Information and Communication Strategies
- Embrace Information Technology in the Administration of Justice and Delivery of Service

3.0 CONCLUSION AND RECOMMENDATIONS

3.1 Conclusion

The symbol of justice of a ñBlindfolded Ladyò holding weighing scales and a sword depicts delivery of justice as noble act of fairness. It symbolises the daily activity of judges of balancing competing interests and rendering justice impartially, fairly and expeditiously. Much as there is very fine distinction between ñlaw and justiceò, there is lack of consensus on what is ñjusticeò and the administration of justice equally impacts on the delivery of justice.

I have strived in this Paper to explore the concept of judicial myths and realities, challenges and opportunities in delivery of justice. Within the concept of wheels of delivery of justice and the administration of justice, I have shown how judicial and non ï judicial officers engage in carrying out their tasks of deliver of justice. I have thrashed out some of the challenges in the delivery of justice and I have attempted proposing some solutions in

making the walk in the journey of delivery of justice a success. I cannot vouchsafe that I have exhausted the list of solutions for they are as varied as there are challenges in the delivery of justice. Surely a ñc***ourt of law***ò, being a ñTemple of Justiceò should be a space where justice is expected to be dispensed or delivered fairly and expeditiously based on rule of law. A large part of the challenge in the delivery or advancing justice in our courts aside from lack of access to justice and delays in disposal of cases is the multiplicity of the challenges, some of which are attributable to the nature of our inherited common law adversarial system. This system take judges as umpires with little or no interference whatsoever with the conduct of court proceedings. This might not explain the daily reality which judges and magistrates face in courthouse across our respective jurisdictions where the majority of the litigants are unrepresented (pro se litigants). Consequently a judge or magistrate cannot escape the fact of having to perform the dual role of umpire and ñpro se advocateò, thus assuming some sort of an ñinquisitorial roleò, but without compromising his or her judicial independence and impartiality.

The calling for judges and magistrates within the East African region now is for them to emulate what is happening in other jurisdictions by taking more control over dispute processing. This is highly critical if any serious and tangible changes are expected in the way our courts manage the ever growing caseload, and the manner in which lawyers behave. Judges and magistrates must therefore be prepared and should exercise more control over court case proceedings instead of acting merely as umpires, leaving it upon the litigants and/or their advocates to determine the pace of the proceedings.

We agree, at least some of us do, that, a court being a ñ***Temple of Justice***ò is a sacred place where justice is to be delivered expeditiously and fairly. However, Judges and Magistrates are not expected to sit down patiently and behave as ñMonksò in this Temple of Justice leaving it to the parties in the legal dispute to ñbattleò it out. Rather, Judges and Magistrates should now be both court and case managers by assuming a more active role in managing not only their individual case dockets (*case management and case flow management*) but also the courts (*court management*) thus fulfilling the realization of the vision of ñ*timely and quality justice for all*.ò

3.2 Recommendations

- Our judiciaries should seriously consider introducing Open Judicial Performance Appraisal Standards and Evaluation Criteria by involving strategic or key stakeholders including our National Bar Associations;

- Judicial Training Institutes should be strengthened to provide Continuing Judicial Education (CJE) and develop judicial education and training programmes for judicial officers both on the job and newly appointed judges (orientation) as well as other professional courses related to court administration and case management.

- Our Judiciaries embark on a process of Legal and Institutional Reforms particularly by proposing amendments to procedural rules, particularly Civil Procedure Codes and Rules of Evidence and Criminal Procedure Codes.

THANKS FORV YOUR KIND ATTENTION!